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No. 71-670

In the Supreme Court of the United States

OCTOBER TERM, 1971

SUNNY HILL FARMS DAIRY CO., INC., PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, A1–A13) is reported at 446 F. 2d 1124. The opinion of the district court (Pet. App. C, A15–A29) is reported at 307 F. Supp. 392.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1971. The petition for a writ of certiorari was filed on November 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).



QUESTION PRESENTED

Whether the court of appeals was correct in sustaining the validity of a milk marketing order providing a higher price for milk delivered to handlers in a three county milk deficit area adjacent to a different market than in other areas affected by the order.

STATUTE INVOLVED

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 601 *et seq.*, provides in relevant part:

7 U.S.C. 608c(5)

> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers * * *.

7 U.S.C. 608c(18)

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area * * * to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

STATEMENT

Petitioner operates a milk processing plant located 120 miles south of St. Louis at Cape Girardeau, Missouri, which since February, 1965, has been regulated under the St. Louis Milk Marketing Order, 7 C.F.R. 1062, issued pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* The Act authorizes the Secretary to establish minimum prices for milk which handlers, such as petitioner, must pay to their farmer-producers. These prices are to be uniform for all handlers, subject to adjustments (or "differentials") based upon "the locations at which delivery of such milk * * * is made to such handlers." 7 U.S.C. 608c(5)(A)(3). The prices set by the Secretary are intended, *inter alia,* to "insure a sufficient quantity of pure and wholesome milk" for the marketing area. 7 U.S.C. 608c(18).

Petitioner's plant is adjacent to the Paducah, Kentucky, and Memphis, Tennessee, marketing areas, as well as unregulated areas in Missouri, where handlers pay from fourteen to sixty cents per hundredweight above the St. Louis order Class I price (App. 9, 151).[1] Its sales in these areas amount to nearly one-third of its total sales (Ap. 150). In addition, Cape Girardeau is a deficit area for fluid milk, and petitioner regularly imports supplies of milk from outside the St. Louis marketing area to meet its needs (Pet. App. A9–A10).

[1] "App." references are to the joint appendix filed by the parties in the court of appeals.

1. In June, 1963, the Secretary of Agriculture conducted hearings on various proposals to amend the St. Louis marketing order. Petitioner, which was not then regulated, proposed that the St. Louis area be expanded to include six counties south of St. Louis, including Cape Girardeau (29 F.R. 15130). Other witnesses proposed a twenty-six cent location differential for Cape Girardeau County in order to align prices with the nearby markets of Kentucky and Tennessee where, as noted, the prices paid by handlers were substantially above those paid by handlers under the St. Louis order (App. 152). Petitioner took no position on the proper amount of any location differential (Pet. App. A2).

The recommended decision, published on May 21, 1964 (29 F.R. 6630), adopted the proposals to expand the marketing area. It rejected, however, the proposals to impose a location differential, concluding that no location differential should apply to the southernmost counties of the marketing areas. Following the filing of exceptions, the Secretary published a final decision on November 10, 1964, effective February 1, 1965 (29 F.R. 15130, 18051).

The final decision computed the Class I price, divided the marketing area into two base zones, and provided that for milk delivered "at a pool plant located in Cape Girardeau, Perry, or Ste. Genevieve County, Missouri, the [Class I price] shall be increased 15 cents per hundredweight." 29 F.R. 15146. The order thus provided for an adjustment in the Class I price, depending upon the location at which

delivery of milk was made to the handler's plant, as authorized by 7 U.S.C. 608c(5)(A)(3). Any handler whose plant is located (or which in the future becomes located) in the zone made up of these three counties will pay $.15 more per hundredweight for Class I milk delivered to his plant than do handlers in the other zone, made up of the other seven counties and the city of St. Louis.

The basis for the location differential was set forth by the Secretary as follows:

> The recommended decision provided for a price at Cape Girardeau equal to the f.o.b. St. Louis price. However, after a careful review of the record in light of the exceptions to the recommended decision, it is concluded that a price 15 cents per hundredweight above the St. Louis price would be more appropriate for the Cape Girardeau area. Such a price at Cape Girardeau appears necessary to assure an adequate supply for plants in the area and also provide for better alignment of prices between orders.

29 F.R. 15139. While the Secretary did not discuss in detail all the evidence contained in the promulgation record and in the exceptions to the recommended decision upon which he based his decision, he did outline the relevant economic considerations which led him to conclude that the differential was necessary:

> * * * Under the present order, a location differential of minus 22 cents would be applicable at this plant. Several witnesses proposed that the order provide for a plus differential of 26 cents at Cape Girardeau. The proponents argued that

the plus differential would be necessary for price alignment with markets in Kentucky, Tennessee and Arkansas.

Producer milk should be priced in relation to its location value. Generally, in order to obtain an adequate supply of milk, markets south of the surplus milk production area (Minnesota and Wisconsin) require progressively higher prices for milk corresponding to the increased cost of transporting milk from such alternative milk supply areas.

Cape Girardeau is approximately 120 miles from St. Louis. It is located on the southern fringe of the supply areas for the St. Louis and Suburban St. Louis markets. Milk produced on farms immediately south of Cape Girardeau (in Scott and Mississippi Counties) is purchased by an unregulated handler located in Sikeston, Missouri (31 miles south of Cape Girardeau). The Sikeston handler pays his producers the St. Louis order Class I price plus 20 cents for milk received from them. The Paducah, Kentucky, marketing area is directly east of Mississippi County. The Class I and blend prices under the Paducah order exceeded the St. Louis order prices by an average of 14 cents and 30 cents, respectively, during the 12-month period preceding the time of the hearing.

The handler at Cape Girardeau purchases most of his supply of milk from producers located in Cape Girardeau County. His pay price to producers has been about 15 cents per hundredweight above the minimum prices received by producers in the county who supply

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regulated handlers located in St. Louis and in the suburban St. Louis market. [*Ibid.*]

Thereafter petitioner operated under the marketing order for the balance of 1965 (Pet. App. A4). During this period petitioner was unable to obtain sufficient quantities of milk to meet its needs, even though paying the differential. Petitioner found it necessary to purchase additional supplies of milk from a non-regulated handler in Illinois in seven of the ten months following regulation. These purchases ranged from 50,000 to 180,000 pounds per month, reaching as much as 17 percent of petitioner's total purchases (Exhibit 11, App. 146–147).[2]

Petitioner also continued to sell one-third of its milk outside the marketing area. For example, petitioner sold nearly 2.5 million pounds of milk in the Memphis marketing area between February and December, 1965 (Exhibit 6, App. 141). The sales in Memphis exceeded petitioner's sales in the city of St. Louis and St. Louis County (*ibid.*).

2. In January, 1966, petitioner sought administrative review of the St. Louis Marketing Order, pursuant to 7 U.S.C. 608c(15)(A). Petitioner contended that the differential provision was unlawful on due process and equal protection grounds, that it constituted a trade barrier, and that it did not tend to effectuate the Act's purposes (Pet. App. A4). However, petitioner did not

[2] Petitioner, prior to regulation, had sought 100 per cent Class I (*i.e.*, fluid milk) utilization; after coming under the St. Louis order its Class I utilization was nearly 95 per cent, and in one month 97 per cent (App. 144). The median Class I utilization for other pool plants under the St. Louis order in 1965 was 76.4 per cent (*id.*).

challenge the sufficiency of the economic evidence in the promulgation record to support the need for a location differential (Pet. App. A9).[3]

The judicial officer sustained the amendments to the St. Louis order (Pet. App. A5). He pointed out that the Secretary had found the differential necessary "to assure an adequate supply for plants in the area" and "insure a sufficient quantity of pure and wholesome milk" (App. 184, quoting 29 F.R. 15130, 15139, 18049) and that petitioner had neither alleged a defect in the evidence on which this finding was based, nor carried its burden by introducing evidence to refute the finding. The judicial officer also noted that the differential was authorized by the Agricultural Marketing Agreement Act, which permits "adjustments from uniform minimum prices for the locations at which delivery of milk is made to regulated handlers" (App. 179).

Petitioner then brought this action to review the judicial officer's decision, pursuant to 7 U.S.C. 608c (15)(B). The district court concluded that, although the location differential was within the terms of the Act, such differentials are valid only if they reflect

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[3] At the hearing on the petition for review, counsel for the Secretary sought to introduce as an exhibit those portions of the promulgation record which supported the Secretary's decision to impose the differential. Petitioner's counsel objected to admission of the extensive promulgation record, indicating he did not contest the sufficiency of the record evidence to support the decision (App. 105–108). The following colloquy took place:

> Mr. CAMPBELL. In other words, you are not taking the position that there was no evidence in the record to support this [differential]?
>
> Mr. NEWBERRY. No, sir.

(App. 107).

actual transportation costs, and that "[i]n this connection there is no evidence in the record to support the differential" (Pet. App. A25). The court further held that the Secretary could not impose a location differential to align contiguous markets, and that there was "nothing in the record to indicate that Sunny Hill could not obtain an adequate supply of milk" without the differential (Pet. App. A24–A25, A27).

The Court of Appeals for the Eighth Circuit reversed and upheld the location differential (Pet. App. A1–A13). The court concluded that the differential

> not only fits within the literal definition of a location adjustment permitted by the Act, but was found by the Secretary to be necessary to assure an adequate supply of milk for the plants in the area and to provide for better alignment of prices between orders. No challenge was lodged as to the sufficiency of the evidence to support these findings. [Pet. App. A7.]

The Court held that the differential did not create a trade barrier forbidden by 7 U.S.C. 608c(5)(G), since the differential was expressly authorized by the Act and "reasonable under the circumstances of the case" (Pet. App. A12).

ARGUMENT

The location differential in the St. Louis Milk Marketing Order, 7 C.F.R. 1062.52, is expressly authorized by the Agricultural Marketing Agreement Act, which permits adjustments in prices to handlers based

upon "the locations at which delivery of such milk * * * is made to such handlers." 7 U.S.C. 608c(5)(A)(3). The Secretary found the differential necessary in order to assure a sufficient supply of milk for the Cape Girardeau area, which continues to be a deficit area for fluid milk, and to align prices between contiguous marketing areas thereby preventing disruptions in the marketing of milk. Such factors are proper under the Act, 7 U.S.C. 602(4), 608c(18), and the factual basis for their application concededly is supported by substantial economic evidence in the promulgation record. The court of appeals correctly sustained the location differential and, in the absence of any conflict with another circuit, further review is not warranted.

1. As this Court recently pointed out in *Zuber* v. *Allen*, 396 U.S. 168, 183, "Congress has spoken with particularity and provided specifically enumerated differentials" in Section 8c(5) of the Agricultural Marketing Agreement Act. One of these "specifically enumerated differentials" is the one in Section 8c(5)(A)(3) that permits adjustments from the uniform prices paid by handlers based upon "the locations at which delivery of such milk * * * is made to such handlers." 7 U.S.C. 608c(5)(A)(3). The location differential in the St. Louis Order provides a fifteen cent location differential for milk delivered to a handler in the three southernmost counties of the marketing area, which are located more than 100 miles south of the city of St. Louis and adjacent to two other federal

marketing order areas.[4] Thus the location differential was based upon the location of the handler's plant and is within the class of differentials the Act authorizes.

The bases for imposing the differential were set out by the Secretary in his amendment order (29 F.R. 15139). Based upon the evidence of record at the promulgation hearing, the Secretary concluded that

> [a fifteen cent adjustment] appears necessary to assure an adequate supply for plants in the area and also provide for better alignment of prices between orders.

In addition, the Secretary found that the location differential accorded with the general principle in pricing milk under marketing orders that "[p]roducer milk should be priced in relation to its location value" (*id.*).

Such considerations are a proper basis for the Secretary's decision under the Agricultural Marketing Agreement Act. 7 U.S.C. 608c(18), 602(4); *Fairmont Foods Co.* v. *Hardin*, 442 F. 2d 762, 767–68 (C.A.D.C.). Section 8c(18) requires the Secretary to "fix such prices as he finds will * * * insure a suffi-

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[4] Petitioner contends that it has been "singled out * * * for special and discriminatory treatment" (Pet. 9) because it is the only handler presently affected by the location differential. However, the amendment order is applicable to any other handler which may become regulated in the three-county zone. 29 F.R. 15139. There were a number of milk producers in Cape Girardeau County who might expand their operations and become plant operators. Petitioner's president testified that his company had begun as a producer and gradually expanded into a handler (App. 26).

cient quantity of pure and wholesome milk * * *." The Secretary's action in aligning prices in adjacent markets to prevent disruptions is sanctioned by Section 2(4), declaring the policy of the Act to be to "establish and maintain * * * orderly marketing conditions." In *Fairmont Foods Co.*, the court held that the Secretary "may take account of large trends and flows when formulating regulatory policies." 442 F. 2d at 767–768.

As the court of appeals noted, petitioner did not challenge the sufficiency of the extensive evidence in the promulgation record supporting the Secretary's conclusions (Pet. App. A9). The court also found that the evidence presented in the review proceeding under 7 U.S.C. 608c(15)(A) did not undermine the Secretary's findings. As this Court has held, it is not for the courts "to reject the balance [the Secretary] struck on consideration of all the factors unless we can say that his judgment is not one that a fair minded tribunal with specialized knowledge could have reached." *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 614.

2. The decision below is not in conflict with any decisions of other courts of appeals or of this Court. In *Fairmont Foods Co.* v. *Hardin, supra*, the District of Columbia Circuit invalidated a similar location differential solely on the ground that there was "no substantial evidence of record to support the Secretary's findings." 442 F.2d at 767. The court did not, as petitioner suggests (Pet. 13), find "no statutory justification" for the differential. Rather, it concluded that imposition of a location differential in part to

align contiguous markets would be valid only where the evidence demonstrated substantial sales in the adjacent market (442 F.2d at 772)—as is true in the present case.

Nor is this location differential, based upon the location of the handler's plant, invalid under *Zuber* v. *Allen*, 396 U.S. 168. The issue in *Zuber* was whether a differential based upon the location of the producer's plant, a factor not mentioned in Section 8c (5)(A), could nonetheless be sustained under 7 U.S.C. 608c(5)(A)(1) as a market differential customarily applied. The Court, expressing reluctance "to follow a path not marked by the language of the statute," 396 U.S. at 181, held the differential invalid, concluding that the term "market differential" referred to "cost adjustments" or "particular understood economic adjustments." 396 U.S. at 180, 181. In addition, the Court pointed out that "the Secretary [has not] advanced any economic justification for these differential payments." 396 U.S. at 188.

In contrast to *Zuber*, the differential here is based upon the location at which milk is delivered to the handler's plant, as authorized by the language of Section 8c(5). It reflects the Secretary's determination that such an adjustment was necessary to insure sufficient quantities of fluid milk in a deficit area, and to maintain orderly marketing conditions by aligning prices between contiguous marketing order areas. Such economic factors, supported as they are by the evidence in the record and concededly based upon the promulgation record, justify the location differential here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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